Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO., INC.

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March 1975

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SUPPLEMENTAL BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.

PRELIMINARY STATEMENT

This supplemental brief on behalf of appellees NARI et al. is filed prior to hearing under and pursuant to the provisions of Rule 41(5) of the Supreme Court Rules. It presents exclusively late authorities and other intervening matters that were not available for inclusion in appellees' brief-in-chief.

I.

Late Authorities Filed To Demonstrate The Commission's Continuing Complete Refusal To Comply With NEPA Right Up To The Date Of Argument In This Case.

In Point V of appellee NARI's main brief, we cited a long list of authorities to demonstrate the Interstate Commerce Commission's complete disdain, hostility and contempt for the National Environmental Policy Act (NEPA) and its statutory requirements, and we contended that the Commission's repeated refusals to comply therewith made it absolutely imperative for the district court in this case carefully to review not only the *form*, but also the *substance* of the Commission's *alleged* compliance with NEPA in the pending action.

On February 24, 1975, after appellee NARI's main brief was filed with this Court, the United States District Court for the District of Columbia rendered its decision in *Maine Central Railroad Company* v. *Interstate Commerce Commission* (See *App. C* hereto), a case which depicts the Commission's continuing defiance of NEPA right up to the very moment the instant case comes before this Court for oral argument. In *Maine Central Railroad,* the district court ruled on February 24, 1975:

> "The Interstate Commerce Commission has unlawfully failed to promulgate valid regulations or procedures for the preparation of environmental impact statements, as required by 42 U.S.C. § 4332 and recommended in 40 C.F.R. § 1500 *et. seq., despite the clear mandate of judicial decisions. Harlem Valley Transportation Assn.* v. *Stafford,* 500 F.2d 328 (2d Cir., 1974); and *Greene County Planning Board* v. *FPC,* 455 F.2d 412 (2nd Cir.), *cert.* denied, 409 U.S. 849 (1972)."

Moreover, since appellees' briefs were filed in this case, a Petition for Review was filed under recently-enacted Public Law 93-584, 88 Stat. 1917, in the United States Court of Appeals for the District of Columbia Circuit to challenge the Commission's total failure to prepare any Environmental Impact Statements whatsoever under NEPA before it approved a series of further general rate increases for the transportation of recyclable commodities in *Ex Parte 299—Increased Freight Rates and Charges to Offset Retirement Increases,* 1973, and *Ex Parte 303—Increased Freight Rates and Charges,* 1974; and to challenge the Commission's complete disregard for the requirements of recently-enacted Section 603 of The Rail Reorganization Act of 1973 (Public Law 93-236, 93rd Congress) which specifically directed the Commission to *"adopt appropriate rules"* to *"eliminate discrimination against the shipment of recyclable materials in rate structures . . . where such discrimination exists"* (See *National Association of Recycling Industries, Inc.* v. *United States and Interstate Commerce Commission,* CCA, D.C. Docket No. 75-1225, filed 3/14/75.)

II.

Documentary Material Just Obtained By Appellees Regarding The Government's Inexplicable, Arbitrary Denial Of The Requests Of The Environmental Protection Agency And The President's Council On Environmental Quality To Be Heard Before This Court In Support Of The District Court's Rulings In This Case.

Both railroad appellants and the Government agree in their briefs that, if this case is properly before this Court at this time, the basic questions presented arise completely under the National Environmental Policy

Act (NEPA), 42 U.S.C. § 4321 et seq. (See Railroads' Brief, pg. 4; Govt's Brief, pgs. 2, 3).

Because they are charged by that very statute (NEPA)[1] and Executive Orders issued by the President of the United States[2] with the administration of that statute (NEPA) and with the duty of appraising the compliance of other federal agencies with the statutory requirements of NEPA, both the Environmental Protection Agency and (upon information and belief) the President's Council on Environmental Quality thus formally applied to the Solicitor General of the United States for permission to file *amicus curiae* briefs or otherwise to present their views and arguments to this Court in support of the district court's opinion and judgment in this case (See *App. D* hereto).

For example, the Environmental Protection Agency, in support of its desire to be heard in this case, advised the Solicitor General on February 4, 1975 (*App. D* hereto):

> "The Environmental Protection Agency is of the opinion that the environmental impact statement of the Interstate Commerce Commission in Ex Parte No. 281 does not meet the requirements of Section 102(2)(C) of the National Environmental Policy Act . . . .
>
> ". . . Such an impact statement does not, in EPA's opinion, comport with the 'good faith reasoned analysis' required where comments of 'sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives.' *Silva* v. *Lynn*, 482 F.2d 1282, 1285 (1st Cir., 1973)."

[1] See National Envinromental Policy Act, 42 U.S.C. § 4321, 4341-4344.

[2] See Reorganization Plan No. 3 of 1970, after 42 U.S.C. § 4321, signed by the President on July 9, 1970; Executive Order 11514, dated March 5, 1970, entitled "*Protection and Enhancement of Environmental Quality.*"

The Solicitor General, unfortunately and unfairly appellees submit, simply refused to permit these two federal agencies, charged by law with the administration and oversight of NEPA, to file briefs with this Court in this case (See *App. D* hereto).

Thus, insofar as the Government's participation in this case is concerned, this Court will hear the Solicitor General flatly embrace the NEPA position repeatedly taken by the Interstate Commerce Commission, while at least two other federal agencies, both directly responsible for the proper operation of the statute before this Court for review, have been effectively enjoined from presenting their views and legal arguments in support of the district court's rulings in this case.

Appellees thus suggest, and with the Court's permission, hereby move that, if the Court ultimately decides it has jurisdiction to review the merits of the district court's rulings in this case under NEPA, a fair opportunity be afforded to both EPA and CEQ to file briefs in response to the questions raised herein by appellants under the National Environmental Policy Act.

III.

On March 14, 1975, In Another Recent, Intervening Case, The Railroads, In Effect, Candidly Conceded That It Is Utterly, Physically Impossible For Shippers Of Recyclable Commodities To Challenge General Rate Increases Approved By The Commission In Subsequent Complaint Proceedings Under The Interstate Commerce Act.

The railroads still argue before this Court in this case that general revenue orders issued by the Commission in proceedings such as *Ex Parte 281* should be deemed *not* reviewable because of the *alleged* availability of Section 13 *complaint* procedures,[3] wherein shippers of recyclable commodities might subsequently challenge *"individual rates"* or *"particular tariffs thus increased"* (See Railroads' Brief, pgs. 21-24).

In its decision in this case, the district court suggested, as have many courts in the federal system before it in recent years, that Section 13 complaint procedures do *not* afford an *"adequate remedy"* for *shippers* already saddled with a Commission-approved, unlawful rate increase.

Recently, in *Ex Parte 305—Nationwide Increase Of Ten Percent In Freight Rates And Charges, 1974,* the Commission turned the tables on the railroads and ruled that the pyramidic 10% increase they sought there for the transportation of recyclable commodities would not be allowed on "a general increase basis," but the railroads could, if they desired, increase the 1974 rates for recyclables on an *"individual rate basis,"* i.e. by filing *"individual tariffs"* to cover each such proposed individual increase.

---

[3] 49 U.S.C. § 13.

From the railroads' point of view, this simply meant that, instead of raising all rates for recyclables at the same time, the rates would have to be raised *"individually", one at a time.*

The railroads, who theretofore argued (as they still do before this Court in this case) that the Section 13 complaint procedure whereby shippers of recyclable commodities burdened with constant annual general rate increases have an *"adequate remedy" under Section 13 to challenge them, individually rate-by-rate through the filing of complaints,* suddenly became frantic. On March 14, 1975, they appeared before the Commission and filed an *"Application For Special Permission"* (see *App. E* hereto) wherein they urged the Commission to reverse itself and permit the filing of *one* new joint tariff whereby the rates for *all* recyclable commodities could be increased simultaneously. In their "Special Permission" filing, the railroads candidly stated for the first time, contrary to the basic position they still take in the case at bar (*App. E*):

> "Unless [special permission] relief is granted herein, applicants would be totally frustrated in their purpose, not because of the merits of the proposed increase, *but by the mechanics of individual tariff adjustment.* In the Eastern District alone, there are more than 1,000 separate tariffs containing line-haul rates and switching charges applying on the movement of recyclables, and there is a multitude of tariffs in the same territory which would have to be adjusted to reflect the proposed increase on other accessorial charges, such as weighing, transit, etc. The effort required under these circumstances would be such as to completely defeat these applicants in applying any across-the-board increase on recyclables for an indeterminate but obviously lengthy future period."

The relevant point, of course, is that if the railroads would be "*frustrated in their purpose*" by merely being required to file *thousands* upon *thousands* of *individual tariffs* to accomplish *one annual rate increase* for the transportation of recyclable commodities, *how could the Section 13 complaint procedure possibly be deemed an "adequate remedy" for national shippers of recyclable commodities who must challenge those rate increases, on an individual tariff-by-tariff basis, in thousands upon thousands of complaint proceedings before the Commission?*

In each such complaint case under Section 13, the railroad involved has the right to file an answer "within a reasonable time". The Commission then has the duty "to investigate" each matter complained of in such manner as it deems proper. The Commission's decision in each case is then subject to court review.

In other words, if a mere "*individual tariff filing*" requirement *allegedly* "frustrates" the railroads' ability promptly to effectuate annual rate increases on recyclables, the lengthy, "*individual complaint*" procedure provided by Section 13 presents an absolutely impossible, insurmountable barrier to the effective review of general rate increases licensed by the Commission in a proceeding such as *Ex Parte 281* . If each Section 13 case took just 2 to 3 years to litigate, it would, by the railroads' own admission in their recent "Application For Special Permission", take no less than roughly 2,000 to 3,000 case-years to complete the complaint procedures applicable to all Eastern District tariffs alone!

Appellees reiterate, therefore, that the Section 13 complaint procedure is, in no sense, an "adequate

remedy" or indeed any remedy at all in a case such as this wherein the Commission has approved a nationwide increase for the transportation of all recyclable commodities wherever they may be carried in the United States.

IV.

The Government Continues Falsely To Represent That "Studies Underway In Ex Parte 270" Will Eliminate All Unlawful, Unreasonable Freight Rates Found To Discriminate Against Recyclable Wastepaper, Textile Wastes And Non-Ferrous Metal Scrap. In A Letter Dated March 5, 1975, The Commission's Special Projects Attorney In Ex Parte 270 Admits In Effect That This Representation Is Not True.

In NARI's main brief, it was demonstrated, with supporting written evidence received from the Commission itself, that it was patently false for the Government to argue in this case that a Commission investigation is underway in *Ex Parte 270* which will eliminate all unlawful rates found to discriminate against recyclable wastepaper, textiles and non-ferrous metal scrap (See NARI brief, pgs. 51, 52; *App. A, B*).

In its Reply Brief, the Government nevertheless continues to rely on its original specious contention, and it asserts: ". . . the Commission was entitled to allocate to that proceeding [*Ex Parte 270*], rather than to particular general revenue proceedings, the full environmental investigation of [those] . . . rates. . . ." (See Govt's Reply Brief, pgs. 8-10).

On March 5, 1975, however, after NARI's main brief was on file with this Court, the Commission's Special Projects Attorney in charge of the *Ex Parte 270* rate study procedures, wrote to counsel for NARI emphasizing in effect that the Government's *Ex Parte 270* contentions in this case are *not* true insofar as re-

cyclable non-ferrous metal scrap, wastepaper and textile wastes are concerned. He reemphasized, first of all, that none of these recyclable commodities have been included in any of the seven formal *Ex Parte 270* "lead dockets." He then stated that rates charged for *non-ferrous metal scrap* and 125 other commodities have simply been referred by the Commission to *his "Special Projects Group"* for *"study and analysis"*, but he immediately emphasized and warned:

> "Thus, as you can appreciate, we have no powers other than those possessed by any other independent party to *Ex Parte 270,* such as yourself. *Specifically, we have no powers 'to issue meaningful orders correcting any serious inequities, discrimination or unlawful rates' should such be found to exist. . . .*" (Italics supplied.)

Finally, the Special Projects Attorney's letter of March 5, 1975 was *absolutely silent* concerning recyclable wastepaper and textile wastes. It was restricted entirely to non-ferrous metal scrap, indicating of course that the rate structure for wastepaper and textile wastes, the largest contributors to this country's growing "mountains of solid waste," are *not* even part and parcel of the meaningless "study and analysis" procedures in *Ex Parte 270.*

Respectfully submitted:

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March 1975

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-157

MAINE CENTRAL RAILROAD COMPANY, *Plaintiff*

v.

THE INTERSTATE COMMERCE COMMISSION,
GEORGE M. STAFFORD, *Defendants*

and

AMOSKEAG COMPANY, *Intervenor-Defendant*

Order

(Filed February 24, 1975)

Having considered plaintiff's Motion for Preliminary Injunction, the pleadings and papers filed in support thereof, the responses of defendant and the intervening defendant, and the oral presentation of all parties at argument held on February 14, 1975, it is in accordance with the Memorandum Opinion attached hereto, this 21st day of February 1975,

ORDERED AND ADJUDGED that defendants, their employees, agents and attorneys are hereby preliminarily enjoined, pending trial herein, from holding hearings on the merits in Consolidated ICC Finance Docket Nos. 27620 and 27621, unless and until the defendants shall have

(1) established procedures for the preparation of an environmental impact statement complying with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332(2)(B) and 4332(2)(C), and

(2) prepared and circulated and obtained the comments of appropriate public and private entities on a valid draft environmental impact statement compiled in accordance

with such lawful procedures for the preparation of an environmental impact statement.

/s/ JUNE L. GREEN
June L. Green
U. S. District Judge

(Caption Omitted in Printing)

Memorandum Opinion

(Filed February 24, 1975)

This matter came before the Court on plaintiff's Motion for Preliminary Injunction, the pleadings and papers filed in support thereof, the responses of defendants and intervening defendant, and oral presentation of all parties at argument held on February 14, 1975.

The controversy centers on whether the defendants, Interstate Commerce Commission (hereinafter ICC) and its chairman, George Stafford, have complied with the requirements of the National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. 4321 *et seq.*, with regard to agency proceedings thus far completed on Consolidated ICC Finance Docket Nos. 27620 and 27621. Agency hearings were scheduled to commence on Finance Docket No. 27620 on February 18, 1975. Plaintiff sought to enjoin holdings of any hearings on the docket numbers herein until such time as ICC established procedures conforming to the requirements of NEPA and developed and circulated a valid Draft Environmental Impact Statement in accordance with the lawful procedures.

FINDINGS OF FACT

1. ICC Finance Docket No. 27620 is an ICC complaint against Amoskeag Company filed April 2, 1974, by plaintiff Maine Central Railroad Company (hereinafter Maine Central), charging that Amoskeag unlawfully possesses power

to control Maine Central, in violation of Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

2. ICC Finance Docket No. 27621, which was consolidated for all purposes with the above complaint, is an application filed April 23, 1974, by Amoskeag Company to acquire control of Maine Central pursuant to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2).

3. Since the adoption of its environmental rules presently codified at 49 C.F.R. 1100.250 (adopted January 14, 1972), the ICC has failed to develop or formally propose to the Council on Environmental Quality (CEQ), regulations or procedures governing the agency's methods for complying with the procedural provisions for the preparation of environmental impact statements established by NEPA, 42 U.S.C. § 4332, and the Guidelines of the CEQ, 40 C.F.R. § 1500 *et seq.*, (1974).

4. The possible environmental impact of the major federal action proposed in Consolidated ICC Finance Docket Nos. 27620 and 27621 has been the subject of substantial controversy among the public and private parties participating in the administrative proceedings. Concern is expressed over the relationship between the proceedings and the proposals of the private applicant, intervenor-defendant Amoskeag Company, for the implementation of operational changes involving Maine Central, Bangor & Aroostook Railroad Company and the Boston & Maine Railroad Company, and the possible development of a New England Railroad System.

5. The Administrative Law Judge of defendant, ICC, in his Memorandum and Order following a prehearing conference served August 7, 1974, found that the matters raised in Consolidated ICC Finance Docket Nos. 27620 and 27621 constitute a proposal for major federal action which may significantly affect the quality of the human environment, thus requiring the issuance of a draft environmental impact statement.

6. The Administrative Law Judge in the August 7, 1974 Order, directed the private applicant, Amoskeag Company, to submit a proposed draft environmental impact statement first, and the other parties to submit such statement at a later date covering at least the environmental issues represented by their respective interests, all in accordance with 49 C.F.R. 1100.250.

7. The Administrative Law Judge further stated that the parties' proposals should not consider the possible environmental relationship of the proceedings to Amoskeag Company's proposals for operational changes affecting Maine Central, Bangor & Aroostook Railroad Company and the Boston & Maine Railroad Company which might be the subject matter of other proceedings before the ICC at a future date.

8. On November 20, 1974, the Commission issued a draft environmental impact statement covering the proceedings in Consolidated ICC Finance Docket Nos. 27620 and 27621, and said statement, with only minor modifications, adopted substantially, and largely in verbatim terms, the environmental analysis and factual material provided by the submission of the private applicant, Amoskeag Company.

9. On December 16, 1974, Maine Central, later joined by the State of Vermont, filed a petition with the ICC seeking dismissal of the application in Finance Docket No. 27621, or alternatively, a stay of the commencement of hearings pending issuance of a draft environmental impact statement which was compiled in accordance with lawful procedure.

10. In an order served January 10, 1975, the Interstate Commerce Commission-Division 3 found that the procedures followed by the administrative law judge in many respects were inconsistent with the policies of the ICC and judicial decisions interpreting the requirements of NEPA, but denied the petition because the opportunity was avail-

able to file comments to the draft which would be given due consideration at the appropriate time, and further that on the merits, relief was not warranted.

11. Notice was served by the ICC on January 10, 1975, that the hearings would commence February 18, 1975, instead of January 20, 1975, as originally scheduled.

Conclusions of Law

1. This Court has jurisdiction to grant injunctive relief, or relief in the nature of mandamus, under 28 U.S.C. §§ 1331 and 1361; 5 U.S.C. §§ 701-706; and 42 U.S.C. §§ 4321 *et seq.*, the National Environmental Policy Act of 1969, *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Harlem Valley Transportation Assn.* v. *Stafford*, 500 F.2d 328, 334 (2d Cir. 1974); *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511-12 (D.C. Cir. 1974); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 654-55 (10th Cir. 1971). The Court thus has jurisdiction to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-02.

2. Plaintiff has standing in its own right and as a "private attorney general" to enforce the mandates of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., *Harlem Valley Transportation Assn.* v. *Stafford, supra; Sierra Club* v. *Morton*, 405 U.S. 727, 737, 740 (1972); *National Helium Corp.* v. *Morton*, 455 F.2d at 654-55; *Scanwell Laboratories* v. *Schaffer*, 424 F.2d 859 (D.C. Cir. 1970).

3. The Interstate Commerce Commission's procedures for preparing draft and final environmental impact statements, 49 C.F.R. §§ 1100.250 *et seq.*, violate the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, and do not conform with the Guidelines of the CEQ, 40 C.F.R. §§ 1500 *et seq.*, in that they do not provide for the preparation of draft environmental impact statements

prior to public hearings, they call upon private applicants to provide the analysis and factual basis for the Commission's impact statements, and they do not provide a procedural foundation for the Commission's preparation of its own, independent and comprehensive, draft environmental impact statement to be available for informed public comment prior to required public hearings.

4. The Interstate Commerce Commission has unlawfully failed to promulgate valid regulations or procedures for the preparation of environmental impact statements, as required by 42 U.S.C. § 4332 and recommended in 40 C.F.R. § 1500 *et seq.*, despite the clear mandate of judicial decisions. *Harlem Valley Transportation Assn.* v. *Stafford,* 500 F.2d 328 (2d Cir. 1974); and *Greene County Planning Board* v. *FPC,* 455 F.2d 412 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972).

5. Despite the possibly important and controversial issues relating to the scope and extent of environmental impact raised in Consolidated ICC Finance Docket Nos. 27620 and 27621, the Administrative Law Judge of the Commission directed that the parties submit a "proposed draft environmental impact statement" limited in scope. The Commission then issued a draft impact statement which, in its substantial adoption in often verbatim terms of Amoskeag Company's statement, was seemingly devoid of the Commission's own comprehensive and independent analysis in violation of NEPA, 42 U.S.C. 4332 and contrary to the CEQ Guidelines, 40 C.F.R. 1500 *et seq.* Impact statements developed in this manner would not provide, as NEPA requires, for full and fair agency development and consideration of the matters that are to be included in impact statements nor would it secure informed comments from interested public or private persons that, together with the draft impact statement, "shall accompany the proposal through the existing agency review processes" of which a public hearing is a part.

6. For the Interstate Commerce Commission to proceed with preparation of a final impact statement based on comments to the draft, and to proceed with public hearings required under the Interstate Commerce Act on ICC Finance Docket Nos. 27260 and 27261 on the basis of a draft environmental impact statement prepared under such improper procedures violates NEPA, 42 U.S.C. §§ 4321 *et seq.*, and is contrary to the CEQ Guidelines, 40 C.F.R. §§ 1500 *et seq.*

7. The public interest and the balancing of harms warrant injunctive relief to prevent the ongoing violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., *United States* v. *City and County of San Francisco,* 310 U.S. 16, 30-32 (1940); *Jones* v. *District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 512 (D.C.Cir. 1974).

/s/ JUNE L. GREEN
June L. Green
U. S. District Judge

Dated: February 21, 1975

APPENDIX D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND WASTE MANAGEMENT

Mr. Edward Merrigan
Smathers & Merrigan
888 17th Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

As a result of our conversation and the concern I have for the proper resolution of the freight rate and NEPA issues in U.S. v. S.C.R.A.P., I initiated an effort to have EPA submit an amicus curiae brief. This effort culminated in a draft brief and a request from EPA's Office of General Counsel to the Solicitor General for permission to file a brief. This request was refused primarily because EPA's views on the matter are well known to the Court (see the enclosed correspondence). I regret that EPA will not have the opportunity to give a stronger indication to the Court of its position on these issues.

Please notify me when oral argument is scheduled.

Sincerely,

/s/ ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator for
Solid Waste Management Programs
(AW-562)

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

February 6, 1975

Robert V. Zener, Esq.
General Counsel
United States Environmental
Protection Agency
Washington, D.C. 20460

Re: United States, et al. v. S.C.R.A.P., Nos. 73-1966 and 73-1971, October Term, 1974

Dear Mr. Zener:

I have your letter of February 4, 1975, requesting that the Environmental Protection Agency be authorized to file a separate *amicus curiae* brief in the above case stating EPA's views.

While I understand your views in this matter, it appears EPA has no independent regulatory authority in regard to the actions of the Interstate Commerce Commission involved in this case. Rather, EPA's role was to comment on the ICC's draft environmental impact statements and that was done here. EPA's comments are part of the record and are reprinted in the Joint Appendix. Moreover, counsel for the appellees has relied upon EPA's views in arguing that the ICC did not adequately respond to the comments of EPA and other agencies of the federal government.

Therefore, for these and other reasons discussed with you by telephone, I must respectfully refuse your request for authorization to file a separate *amicus curiae* brief in this case.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 4, 1975

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

Honorable Robert H. Bork
Solicitor General
Department of Justice
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Bork:

Re: United States (Interstate Commerce Commission), et al. v. S.C.R.A.P., Nos. 73-1966 and 73-1971

I am requesting permission to submit to the Supreme Court the views of the Environmental Protection Agency regarding certain aspects of the above-captioned case. The interest of this Agency in the case stems from our role under the National Environmental Policy Act and the Guidelines of the Council on Environmental Quality in the environmental impact statement process. Specifically, NEPA requires the federal agency proposing a major federal action significantly affecting the environment to obtain comments from the appropriate federal agencies prior to preparing an environmental impact statement. EPA is frequently involved in this comment process. In our view, this commenting process is meaningless unless the federal agency proposing action is required to make an adequate response to the other agency comments. The Environmental Protection Agency is of the opinion that the environmental impact statement of the Interstate Commerce Commission in Ex Parte No. 281 does not meet the requirements of Section 102 (2)(C) of the National Environmental Policy Act.

In particular, EPA believes that the Commission has failed to provide a reasonable evaluation of and an adequate response to a number of serious criticisms which sev-

eral federal agencies have levied against the Commission environmental impact statement. This failure of analysis deprives the final impact statement of thoroughness and objectivity and strongly suggests that the NEPA procedure followed by the Commission lacked the requisite "good faith", "hard look" at the environmental implications of a general increase in rail transportation rates for recyclable materials. The Commission's evaluation in response to agency comments is inadequate in the following three areas:

(a) The impact of the proposed changes in transportation costs on the demand for recyclables;

(b) The impact of the proposed rate increase on capital investment in the recycling industry;

(c) Reasonable alternatives to a general rate increase on recyclables.

Following is a detailed discussion of these points.

EPA, as early as April 24, 1972 in its letter to the Commission, and the Department of Commerce in responding to the draft environmental impact statement, pointed out that the Commission should conduct an economic evaluation on the responsiveness of the demand for secondary materials to changes in transportation costs. It was suggested that such a study consider the cumulative impact of several rate increases as well as the specific impact of the proposed general increase. (Appendix, pp. 572-579)

The major response of the Commission has been to cite limited historical data showing that the demand for recyclables has continued despite past increases in rail rates. This response is inadequate because it is clear that the demand for recyclables is affected by several factors besides transportation costs. It is erroneous to observe the aggregate effect of all pertinent factors (in this case, continued demand for recyclables commensurate with increasing rail rates), yet to conclude without economic analysis that one factor (transportation rates) has no effect. Such evaluation is fallacious, and might just as well lead to the incorrect conclusion, because the demand for non-recyclables has been increasing in the face of rail rate increases, that transportation costs play no role in determining the demand for these materials.

The Commission also responded to EPA's recommendation by merely identifying factors which would have a greater influence on the demand for recyclables than transportation costs. The Commission has conducted no detailed evaluation or quantification of the extent to which transportation costs may affect demand. The Commission has essentially asserted in conclusory fashion that because factors other than transportation costs are the most important determinants of product demand, it need not perform substantive economic analysis on the effect of a rate increase. For example, the Commission stated that because the demand for ferrous scrap metal is related to the total amount of steel produced, the elasticity of demand studies recommended by EPA are unnecessary. Here, too, the Commission's effort to comply with NEPA is superficial, consisting of the economically unsound proposition that because a variety of factors influence the demand for recyclables, reliable evaluation and quantification of the effect of one factor, rail rates, is unnecessary. An objective inquiry into the impact of the rate increase requires at minimum an economic analysis sufficiently detailed to establish a supply-demand curve for each major secondary commodity.

Finally, the inadequacy of the Commission's response to agency comments in this regard is indicated by its apparent lack of conviction in its own limited economic evaluation. While opining that the rate increase will have no impact on the demand for secondary materials, the Commission is simultaneously "holding down" the rate increase on recyclables other than ferrous metal, in the belief that such action "should encourage the movement and recycling of commodities." (Appendix, p. 574).

Similarly, in Ex Parte 295, as to certain scrap commodities, the Commission has reached conclusions contrary to those of its cursory analysis in Ex Parte 281. Thus, in Ex Parte 295 the Commission has recently concluded as to a 3% rate increase on nonferrous scrap:

> "[An estimated [additional] 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year. (ICC, Final Environmental Impact Statement, Ex Parte 295, Increased Freight Rates and Charges, 1973—Recyclable Materials p. 2-13.).

With respect to iron and steel scrap, the Commission now says that a rail freight increase of 3 per cent on scrap being transported for recycling will result in:

> "an expected annual decrease in recycled scrap of . . . 67,000 tons . . . , resulting in additional mining requirements for 156,000 tons of domestic ore, 58,300 tons of coal and 14,700 tons of limestone and dolomite. The processing of additional ore is expected to require an increase of 324 thousand megawatt hours; increased pollutants emitted are estimated as 4,500 tons (on a controlled basis)." (p. xiv)

Moreover, the Commission now acknowledges that:

> "In the long term, the effect of the proposed 3 per cent rate increase will be to perpetuate and increase any inequities that may exist in the rail freight structure between primary and secondary commodities. Such an effect applies particularly to waste paper and to non-ferrous metals for which the Interstate Commerce Commission has computed differentials in favor of primary materials. [,]" (p. xv-xvi)

and that:

> "to the extent that [the proposed 3 percent rate increase] decreased the movement of scrap and brought about a corresponding increase in the consumption of virgin metal, there may be adverse effects on the environment . . . , relating not only to accumulation of solid waste but also to the secondary consequences of resource consumption, higher level of pollutants discharged during processing, and—most of all—greatly increased demands for energy. (p. 2-3)
>
> "In this connection, strong arguments can be made, generally and qualitatively, that by increasing the total costs of recycling, raising the rail freight rates will significantly decrease scrap reclamation." (p. 2-19)

A second area of agency comments concerns the necessity for determining whether the proposed rate increase, in its cumulative effect over the long-term, could deter investment in the recycling industry. On the one hand the lack of capital investment in the recycling industry adversely affects the demand for recyclables. Yet because the Commission has failed to determine the importance of transportation rates to the long-term demand for recyclables, it cannot adequately evaluate the impact of a rate increase on capital investment. Such an impact, were it to occur, could in turn reduce the long-term demand for recyclable commodities.

The importance of such a determination is illustrated by one example involving the Commission's finding that electric arc furnaces are expected to produce a growing percentage of the nation's total steel output. These furnaces are not integrated to the ore mining industry and can utilize nearly 100% ferrous scrap. Understanding whether the rate increase would impede the commercial development of such furnaces is necessary in order to evaluate thoroughly the environmental implications of the rate increase.

The Commission also failed to respond adequately to agency comments suggesting an analysis of alternatives

to the proposed rate increase. CEQ and EPA commented that an assessment of the necessity for the proposed rate increase and an evaluation of alternatives entails understanding the extent to which the current rates are cost-based. (Appendix, pp. 705, 708) The feasibility of any rate "hold-down" as an alternative would in part be determined by the degree to which the current rates are cost-based. In particular CEQ and EPA requested a determination of whether secondary materials make a proportionally greater contribution to railroad costs than do competing virgin materials.

The General Services Administration also criticized the draft impact statement for failing to analyze the feasibilty of a rate "hold-down" as an incentive to more recycling. (Appendix, p. 597). The Department of Commerce similarly pointed out that the Commission had yet to evaluate the impact of a rate increase on a rate structure which provides little or no incentive for transporting environmentally charged materials. (Appendix, p. 578).

The Commission's response to all proposals that the alternative of a rate "hold-down" be explored consisted primarily of a dissertation on ICC rate-setting criteria. (Appendix, pp. 213-236). Such a discussion contributed nothing toward answering the questions posed. The Commission has yet to indicate what portion of the transportation rates and the rate increase is attributable to railroad cost, what portion is allocable to non-cost characteristics and whether recyclables are contributing a proportionally greater share to railroad costs.

Without knowing what shipping costs are it is most difficult to weigh the environmental effects of shipping greater or lesser amounts of scrap against the cost of providing the services. Evaluating the feasibility of a major alternative, a "rate holdodown", is therefore impossible. As the Department of Commerce stated in reviewing the

Commission's draft environmental statement, "There is need for solid independent analysis that considers new economic realties." (Appendix, p. 573).

Such superficial response to agency recommendations is illustrated by the Commission's reply to CEQ's suggestion that a "hold-down" on rates for recyclables be imposed pending adequate evaluation of the environmental impact of the rate increase. The Commission stated that such would be "wholly at odds with the achieving of a cost-related pricing structure." (Final EIS, at p. 190). Yet when presented with EPA's proposal to determine whether the rate increase for each commodity was cost justified, the Commission responded that such an evaluation was "so far out of line with the fabric of rate regulation in America that the proposal could not have been considered a practical alternative." (Final EIS, p. 194).

Furthermore, EPA suggested that several other alternatives to a general rate increase be investigated, including the establishment of incentive loading rates (similar to non-ferrous schedules already implemented), improved loading methods, more efficient car desgns, and more efficient scheduling. (Appendix, p. 711). Yet, the Commission, while conceding that the railroad industry has tended to cling to all too many inefficient and uneconomical practices, asserted as its singular evaluation of the proposed alternatives that it does not "believe" such requirements can bring about more efficient carrier management. (Final EIS, p. 199).

In conclusion, it is EPA's view that the Commission's response to these and other important agency recommendations reflects a shallow evaluation of the environmental impacts of and the alternatives to the proposed rate increase on recyclables. As the Department of Interior noted of the Commission impact statement, ". . . instead of an impact appraisal, the main thrust of the discussion

is the justification of increased rail freight rates." (Appendix, p. 703). Such an impact statement does not, in EPA's opinion, comport with the "good faith reasoned analysis" required where comments of "sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives." *Silva* v. *Lynn,* 482 F.2d 1282, 1285 (1st Cir., 1973).

Sincerely,

/s/ ROBERT V. ZENER
Robert V. Zener
General Counsel

APPENDIX E

TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS
TWO PENNSYLVANIA PLAZA SUITE 500 NEW YORK, N.Y. 10001

DAVID M. ROGERS
Director of Publication Services

March 14, 1975

File: 5549

APPLICATION FOR SPECIAL PERMISSION

H-225, J. F. Doyle, Agent

To the Interstate Commerce Commission
Washington, DC 20423

J. F. Doyle, Agent for and on behalf of United States railroads (except the Long Island Rail Road Company) respectfully petitions the Interstate Commission under Section 6 of the Interstate Commerce Act, as amended, for authority to depart from the provisions of Tariff Circular 20, so as to publish on statutory notice a Tariff of Increased Rates and Charges containing a conversion table which, if subsequently permitted to take effect, will provide a 10 percent increase on "recyclable" commodities. Connecting supplements will then be issued so as to connect the conversion table to all tariffs containing rates and charges on recyclables.

I

The purpose of this application is to simplify, for both carriers and shippers, the application of a proposed 10 percent increase on recyclable commodities, authority for which was withheld under the order entered by the Commission on June 3, 1974 in Ex Parte No. 305, *Nationwide Increase of Ten Percent In Freight Rates and Charges, 1974.*

Employment of a conversion table to accomplish a widespread adjustment in rates and charges carried in numerous tariff publications is an efficient and clear-cut method of apprising the shipping public of the involved adjust-

ment. The contemplated adjustment in rates and charges on recyclable materials covers a substantial group of diverse commodities, with the basic rates carried in literally hundreds of separate rate tariffs published by agencies and individual lines throughout the United States and Canada. In addition, the contemplated adjustment applies to charges for such services as switching, weighing and transit among others. No reasonably precise estimate of the number of accessorial tariffs applicable within the scope of this adjustment is readily available.

A cursory examination of the situation within Official Territory has been made. If Eastern carriers and their agents must separately amend each individual rate tariff applicable on recyclable materials, in excess of 1,040 tariffs would be involved.

A serious complication, burdensome to shipper and carrier alike, will inevitably arise if it is not possible to accomplish this adjustment by means of a conversion table publication providing for sequential application following Master Tariff X-303. The proposed 10 percent adjustment is to apply to rates and charges increased under the provisions of presently applicable Master Tariffs such as X-299 and X-303. There has ben no final order in Ex Parte 299. Thus, tariff publishers are unable to incorporate the Ex Parte 299 increases in their tariffs (despite the fact that Ex Parte 303 is final).

As a result, unless the Commission is able and willing to grant substantial relief from tariff publishing rules and regulations, the carriers are effectively prevented from implementing the long-overdue adjustment in rates and charges on recyclable materials. Any rule relief accorded would of necessity be complicated and confusing to tariff users. On the other hand, use of a conversion table publication applicable to all existing rates and charges on recyclables will provide an efficient and clear-cut method to accomplish an adjustment of broad and substantial magnitude.

II

A brief description of events preceding the filing of this application should be helpful in understanding the carriers' purpose.

By petition dated April 22, 1974, the nation's railroads, except the Long Island Rail Road, sought authorization from this Commission to increase all freight rates and charges by 10 percent. On June 3, 1974, the Commission issued an appropriate order in Ex Parte No. 305 authorizing implementation of the 10 percent increase on all freight rates and charges except insofar as the increases would apply to the transportation of "recyclables." The order of June 3 withheld any increase in recyclable rates on very specific grounds, to wit:

> "except that in view of the pendency of Ex Parte No. 295 (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials, the said increase is not authorized on the commodities described in paragraph (iii) of the general exceptions to tariff No. X-295-A;" (p. 3)

Pursuant to the authority granted on June 3, the carriers applied the 10 percent increase to all other rates and charges, but no increase was published to apply on recyclables.

On October 29, 1974 the Commission decided the pending Ex Parte 295 (Sub-No. 1) proceeding and authorized therein a 3 percent increase in the rates and charges applying on movements of recyclable commodities. In essence, the condition upon which the Commission has denied relief as to recyclables in its order of June 3, 1974, has been removed.

In these circumstances, the railroads party to the initial petition in Ex Parte 305, excepting the Chessie System and its subsidiaries, filed a petition for authority to amend the Ex Parte 305 master tariff in order to effect as to recyclables the same 10 percent increase which had been approved

six months earlier on all other traffic. This latter petition was filed on December 26, 1974, along with a *Petition for Leave to File* such petition. The procedural *Petition for Leave to File* the substantive petition for authority to amend the Ex Parte 305 tariff was deemed necessary by the petitioners in that more than 30 days had elapsed since the initial Ex Parte 305 order entered on June 3.

On January 13, 1975, the Commission, Division 2, rejected the petition in question as "not timely" in the Ex-Parte 305 proceeding. The rejection was publicized by a *NOTICE* issued in Ex Parte 305 on January 13, 1975. A copy of that Notice is attached hereto as Appendix A.

The reason for rejection, as stated in the Notice, was in obvious error. A procedural petition for leave to file a substantive petition, under the Commission's rules, cannot possibly be held as "not timely". Under Rule 101 of the Commission's Rules of Practice, petitions for reconsideration must generally be filed within 30 days after an order is issued, but Rule 101(e) specifically provides that where good cause is shown, a petition for reconsideration may be filed after the 30-day period. This is in accord with the right granted under Section 17(6) of the Act specifying that any party "may at any time . . . make application for rehearing, reargument or reconsideration . . ." That specific statutory right can be and is limited by Commission regulation to the 30-day period referred to earlier, but, by virtue of both the statute and Rule 101(e), any party is entitled to seek *leave to file* a new petition at any time, and this is generally done through the use of a procedural petition for leave to file the substantive petition. (See, for example, Respondents' Petition for Leave to File Petition for Vacation of Suspension and Petition for Relief, filed September 26, 1968, in Ex Parte No. 259.)

The Commission, of course, may find that the petition seeking such leave does not state "good cause" and therefore refuse to consider the accompanying request (petition) for substantive relief, but that is not the case here, and the Commission was completely without authority to reject the petition for procedural relief as "not timely".

III

For reasons not pertinent here and despite the obvious error of Division 2 in rejecting the petition for leave to file a substantive petition as "not timely," petitioners here elected not to seek reconsideration of the rejection. Instead, they chose to follow normal procedures, as suggested in the Notice. The proposal for a 10 percent increase in all rates and charges on recyclables was public docketed by each of the rate bureaus involved, and a public hearing was afforded to all interested shippers on February 11, 1975. Since the proposal would have nationwide application on all recyclable rates, the publication sought was to be effected through a supplement to the Ex Parte No. 305 master tariff.

By letter, dated February 7, 1975, over the signature of the Chief, Section of Tariffs (File 215-56111), Interstate Commerce Commission, the supplement in question was rejected on the ground that the earlier NOTICE issued by Division 2 had denied any authority to proceed in that fashion. There is nothing whatsoever to indicate that the Notice in fact denied such authority. As shown above, the Notice simply—and improperly—rejected the procedural petition as not timely filed.

In any event, the net result is that while the condition upon which the Commission withheld authority to implement the initial X-305 10 percent increase on recyclables was eliminated with the Commission's decision in Ex Parte No. 295 (Sub-No. 1), the carriers since August 29, 1974, have been prevented from the *mere publication* of the 10 percent increase on recyclables through the rather bizarre series of events set forth above.

IV

Under these circumstances, the nation's railroads, except for LIRR, now apply to this Commission for authority to depart from the provisions of Tariff Circular 20 to the extent that the applicants be permitted to *publish* —on not less than statutory notice and subject to protests and petitions for suspension—a 10 percent increase on recyclable commodities by means of a conversion table which will therafter be connected to the existing tariffs containing rates and charges on recyclables.

Unless relief is granted herein, applicants would be totally frustrated in their purpose, not because of the merits of the proposed increase, but by the mechanics of individual tariff adjustment. In the Eastern District alone, there are more than 1,000 separate tariffs containing line-haul rates and switching charges applying on the movement of recyclables, and there is a multitude of tariffs in the same territory which would have to be adjusted to reflect the proposed increase on other accessorial charges, such as weighing, transit, etc. The effort required under these circumstances would be such as to completely defeat these applicants in applying any cross-the-board increase on recyclables for an indeterminate but obviously lengthy future period.

As stated earlier, the relief requested cannot possibly have any adverse effect upon the shipping public. The relief sought is simply in the area of publication. The matter has been public docketed and subjected to a public hearing. The appropriate publication would be filed on statutory notice and subject, of course, to protests and petitions for suspension.

The relief sought herein will have no significant effect upon the environment.

It is our request that this application be granted and notification advice by telephone be given to Mr. Owen Schottinger (AC 212-594-0600).